STATE OF MICHIGAN

IN THE SUPREME COURT

RONNIE DANCER and
ANNETTE DANCER,

Plaintiffs-Appellees,

-vs-

Docket No. _____
COA Docket No. 324314
Kalamazoo Docket No. 12-0571-NO

CLARK CONSTRUCTION COMPANY, INC. a Michigan corporation, and BETTER BUILT CONSTRUCTION SERVICES, INC., a foreign Corporation,

Defendants-Appellants.

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Donald M. Fulkerson (P35785)
Attorney of Counsel for Plaintiffs-Appellees
P.O. Box 85395
Westland, MI 48185
(734) 467-5620
donfulkerson@comcast.net

Nathan Peplinski (P66596)
HARVEY KRUSE, P.C.
Attorney for Defendant-Appellant
Clark Construction Company, Inc.
1050 Wilshire Drive, Suite 320
Troy, MI 48084
(248) 649-7800
npeplinski@harveykruse.com

William C. Harsha (P32786)
David A. Priehs (P39606)
Attorneys for Plaintiffs
28116 Orchard Lake Road
Farmington Hills, MI 48334
(248) 737-5544
wcharsha@ix.netcom.com
dap@dpriehspc.com

Ron W. Kimbrel (P32786)
Tyren R. Cudney (P46638)
LENNON MILLER O'CONNOR & BARTOSIEWICZ, P.L.C.
Attorneys for Defendant Better Built
151 S. Rose Street, Suite 900
Kalamazoo, MI 49007
(269) 381-8844
rkimbrel@lennonmiller.com
tcudney@lennonmiller.com

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**DEFENDANT-APPELLANT CLARK CONSTRUCTION COMPANY INC.'S APPLICATION FOR LEAVE TO APPEAL THE APRIL 26, 2016 DIVIDED PER CURIAM OPINION OF THE COURT OF APPEALS, DOCKET NO. 324314, REVERSING SUMMARY DISPOSITION FOR DEFENDANTS**

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HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

## STATEMENT OF ORDER APPEALED

Defendant-appellant Clark Construction Company Inc. (Clark) appeals from the order reversing summary disposition for defendants in this matter entered by the Court of Appeals in *Dancer v Clark Constr Co Inc & Better Built Constr Services Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2016 (Docket No. 324314) (Appendix 1). The Court of Appeals dissenting opinion (Appendix 2) properly dissented in favor of affirming summary disposition for defendants based on the common work area doctrine. The Kalamazoo Circuit Court's September 3, 2014, opinion granting defendants summary disposition is attached as Appendix 3.

## QUESTIONS PRESENTED FOR REVIEW

**WHETHER THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN SIGNIFICANTLY EXPANDING GENERAL CONTRACTOR LIABILITY FOR CONSTRUCTION SITE ACCIDENTS BY REVERSING SUMMARY DISPOSITION ENTERED BY THE TRIAL COURT FOR DEFENDANTS BASED ON THE COMMON WORK AREA DOCTRINE BECAUSE NONE OF THE FOUR ELEMENTS OF THE COMMON WORK AREA DOCTRINE COULD BE ESTABLISHED IN THIS MATTER.**

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
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23. Court of Appeals Register of Actions.

24. *Leffler v HTNB Corp*, unpublished opinion memorandum of the Court of Appeals, issued March 18, 2008 (Docket No. 275962).

25. *Zarazua v Leitelt Iron Works, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006 (Docket No. 266022), lv den 477 Mich 1055 (2007).

26. *Seafoss v Christmas Co*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 249925) lv den 472 Mich 940 (2005).

27. *Wallington v City of Mason*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket Nos. 267919, 269884), lv den 479 Mich 860 (2007).

28. Plaintiffs' EM 385 Excerpts.

29. *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287), lv den 477 Mich 1116 (2007).

30. *Felty v Skanska USA Bldg Inc*, unpublished opinion per curiam of the Court of Appeals issued July 19, 2011 (Docket No. 297991)

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

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ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

## INTRODUCTION

This matter involves a construction site injury. Plaintiff Ronnie Dancer (Dancer[1]), a masonry worker, fell from a scaffolding when he was raising it by himself without wearing his fall protection. Dancer created the fall hazard by deciding not to wear his available fall protection and then walking on improperly overlapping planking that he moved in order to raise the scaffolding. Dancer was working alone at the time of his fall and was the only person to ever face the risk he created in improperly replacing the planking moments before his fall. Moreover, while other trades had previously used the scaffolding, their use of the scaffolding had ended prior to the fall, leaving only Dancer and his fellow masonry employees to work on the scaffolding for at least a week, which means that no other trade had even the possibility of ever facing this same risk.

The common work area doctrine is a narrow exception to the general rule that general contractors are no liable for injuries suffered by employees of subcontractors on construction projects because such employees are properly protected by their direct employer's workers' compensation insurance coverage. In order to fit within the narrow exception, the injured subcontractor employee must show "(1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004). It is impossible for Dancer to meet any of these elements in this case given that he created the risk moments before the fall, was the only person to face the risk he created, and no other trades were working on the scaffolding at that point in the construction project. Under the

[1] Dancer's wife, plaintiff Annette Dancer (Annette), brings a derivative claim in this matter. Dancer and Annette will be referred to collectively as plaintiffs when appropriate.

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

circumstances, the trial court properly granted defendants summary disposition on plaintiffs attempt to create liability on the party of the general contractors where none existed. The Court of Appeal, however, reversed in a split decision. The Court of Appeals majority drastically increased the scope of the narrow exception to the rule of none liability by concluding that, once the scaffolding was a common work area, it had to remain a common work area throughout the project even if other trades stopped working on the scaffolding, by concluding that the hydro mobile scaffolding set up according to industry standard itself should be considered the risk at issue rather than just the risk actually faced by Dancer at the time of his fall, and by apparently requiring defendants, and all other contractors, to impose standards regarding planking the scaffolding beyond what was required by the Michigan Occupational Safety and Health Administration (MIOSHA). As the dissenting Judge Kurtis T. Wilder stated "[t]he majority's contrary conclusion is a step toward imposing strict liability on general contractors for all hazards on construction sites." *Dancer v Clark Constr Co Inc*, unpublished opinion per curiam of the Court of Appeals, issued April 26, 2016 (Docket No. 324314) (Wilder, J., dissenting) (Appendix 2, p 2) This is exactly the opposite of what was intended by this Court in creating the narrow exception to nonliability for general contractors.

The purpose behind the common work area doctrine is to protect workers in areas of the construction project where their direct employer does not have the authority or ability to eliminate serious hazards in the work area. In areas where multiple trades are working at the same time, the work may fall under the adage that when everyone is in charge, no one is in charge. In such circumstances, because the general contractor oversees the multiple trades, it would be the only party with the ability to properly enforce safety requirements on everyone working in the area. But by imposing liability, as the Court of Appeals majority has done,

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

outside of a common work area and instead in an area where one trade and one worker faced a self-created limited risk, the Court of Appeals majority has made the general contractor an insurer for all risk faced on the construction site at all times. This Court never intended to place such liability on general contractors and it is antithetical to good business in this state. The Court of Appeals majority should be reversed peremptorily for the reasons stated in the dissenting opinion. In the alternative, this Court could grant leave to appeal to properly clarify the intended bounds of the common work area doctrine, which the Court of Appeals majority has strayed outside of in this matter.

## STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

### I. THE FORT CUSTER PROJECT

This matter arises out of a construction project occurring at the Fort Custer Training Center in Battle Creek, Michigan. (Second Amended Complaint, Appendix 4, ¶¶ 5, 11-12) Defendant Better Built Construction Services, Inc. (BBC) contracted on December 10, 2009 to work as the general contractor on the project constructing a building at Fort Custer. ((<http://government-contracts.insidegov.com/l/9087598/W912QR10C0017> accessed May 17, 2016) Fort Custer Project Information, Appendix 5) BBC was categorized as a minority owned, small disadvantaged business for the project. (Appendix 5, p 10) Clark worked through a mentoring program with BBC. Clark provided guidance to the smaller business as BBC worked as the general contractor on the project. (Paul Clark Deposition, Appendix 6, p 8)

BBC hired Leidal & Hart Mason Contractor Inc. (Leidal & Hart) to work as the masonry contractor on the project, building the masonry walls of the building under construction. (Brad Leidal Deposition, Appendix 7, pp 5-6, 46) Dancer was employed by Liedal & Hart. Liedal & Hart assigned Dancer to the Fort Custer project. (Appendix 4, ¶ 11) Dancer was a union mason tender with more than 20 years of experience. Dancer worked at the Fort Custer site for about a

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month prior to the fall at issue in this matter. (Dancer First Deposition, Appendix 8, pp 13, 17)

## II. THE HYDRO MOBILE SCAFFOLDING

As part of its work as the masonry contractor on the Fort Custer project, Liedal & Hart supplied three hydro mobile scaffolding units. Liedal & Hart owned the hydro mobile units used on the Fort Custer project. (Walter Kyewski Deposition, Appendix 9, pp 27-28; Glenn Johnson Deposition, Appendix 10, pp 13-14, 52) The three hydro mobiles were metal bases 24 feet long. They were set up sitting next to each other. (Appendix 10, p 14) A photograph depiction of the hydro mobile was entered in the deposition of Liedal & Hart employee Glenn Johnson depicting the setup of the three hydro mobile units:

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(Appendix 10, p 15)

The hydro mobile generally had two levels, the work platform and the staging platform. The staging area was where mortar and working materials would be placed. The work platform consisted of planks on which the workers stood and worked. (Cory Hanson Deposition, Appendix 11, pp 85, 187) The planking rested on outrigger supports. (Nick Martin Deposition, Appendix 12, pp 66-67) Nick Martin, Liedal & Hart's foreman, explained that they used 16 foot planks for the work platforms. The planking was rated for scaffoldings use and was owned by Liedal & Hart. These planks were generally not required to be tied down to the outriggers. (Appendix 12, pp 47-48, 90; Appendix 10, p 95) The rules for the proper use of the planking was controlled by MIOSHA standards, not the standards set in any particular manual. (Appendix 12, p 70) Walter Kyewski, Liedal & Hart's safety director, who had been properly trained in OSHA courses on use of hydro mobile scaffolding, testified that tying down the planking at each out rigger would, in fact, create trip hazards. (Appendix 9, pp 5-6, 8, 54)

John Stewart, Senior Safety Officer for MIOSHA, investigated the fall at issue in this case. Stewart saw that planking was used to connect the hydro mobile to each other. He did not find any MIOSHA violations in the way the scaffolding was set up. (John Stewart Deposition, Appendix 13, pp 4, 13, 28, 40) When asked about standards that may have existed in manuals or contracts and alternative methods of connecting the hydro mobile to each other, Steward indicated that they would not be applicable to the safety standards required by MIOSHA and that MIOSHA would not, and could not, enforce higher standards. (Appendix 13, pp 36, 38, 40, 44) Jim Schaibly of Clark testified that overlapping the planking was industry standard. (Jim Schaibly Deposition, Appendix 17, pp 111-112)

In the course of contrasting the building walls, Liedal & Hart would lay a few courses of

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blocks. They would then raise the hydro mobile up so that it remained at a comfortable height for the masons to work at. Raising the hydro mobile was essentially a one-man job, just requiring starting the engine and pulling a couple of levers to activate the hydraulics. They can be raised with the workers still on the hydro mobile. (Appendix 10, p 43) Each hydro mobile unit could be raised individually, but Liedal & Hart attempted to coordinate the raising of all three at one time. (Appendix 10, pp 103-104) Normally, raising the hydro mobile did not require moving work platform planking. (Appendix 10, pp 43-44)

Liedal & Hart owned, erected, and maintained the hydro mobile. (Appendix 9, pp 27-28;, Appendix 10, p 52) To effectuate its duties regarding the hydro mobile, Liedal & Hart had two competent persons on the project to inspect the scaffolding each day, Nick Martin, the job foreman, and Mike Wiejach, a certified scaffold erector. (Appendix 12, p 12; Appendix 13, p 45) John Stewart of MIOSHA testified that it was not the responsibility of either BBC or Clark to employ a competent person for the project. The responsibility was Liedal & Hart's. (Appendix 13, pp 18-21) Liedal & Hart were the experts in masonry work, scaffolding erection, and raising and lowering the hydro mobile. (Jeff Kelly Deposition, Appendix 14, p 134; Appendix 6, pp 46-47, 50) Liedal & Hart were in complete control of the hydro mobile scaffolding. In fact, Nick Martin, Liedal & Hart's foreman, testified that other trades had to ask permission of Liedal & Hart before they could ever come on the hydro mobile:

> Q (BY MR. DAVIDSON) And if any other trade wanted to use your scaffold they would have to get permission from you?
> A Absolutely. [Appendix 12, p 118.]

Generally, Liedal & Hart were the only contractors to ever use their scaffolding. Weston Allen of the plumbing contractor testified that the plumbing contractor accessed the hydro mobile at times to put pipes into the walls. (Weston Allen Deposition, Appendix 15, pp 5-6) ***Weston Allen testified, however, that the plumbing would be installed in the walls at lower***

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***levels, when the hydro mobile was at 10 to 14 feet***. (Appendix 15, pp 6, 17-18) They never put any plumbing in above 16 feet. (Appendix 15, p 27) Moreover, ***Weston Allen testified that the plumbing contractor only used the scaffolding at other locations on the project and never at the location where Dancer fell because there were no pipes for that wall***:

> Q. And that wall depicted in the photos, do you know how many different pipes you had going into that wall?
> A. That specific wall?
> Q. Yes.
> A. I had zero.
> Q. No pipes?
> A. Not in that wall.
> Q. And that's because the plumbing was against a different wall, was it not?
> A. Correct.
> Q. So in terms of the scaffold at that location, you were never on that scaffold, were you?
> A. Correct.
>
> * * *
>
> Q. The scaffolding as depicted in the pictures in front of you, you never used that scaffolding at that location ever, correct?
> A. Correct. [Appendix 15, pp 28, 57.]

There has also been claims that electrical contractors worked on the hydro mobile. Eric Koshurin was an apprentice electrician on the Fort Custer project. (Eric Koshurin Deposition, Appendix 16, p 7) Kushurin claimed that he and his foreman worked on the hydro mobile to run pipes/conduit and install some electrical boxes. (Appendix 16, pp 10-11, 38) Kushurin admitted, however, that the electricians would not be on the hydro mobile once it passed 20 or 25 feet in height. (Appendix 16, p 11) Kushurin later reiterated that the electricians were not on the hydro mobile scaffolding once it passed 20 feet in height: "Yes. I think 20 foot would be the highest that we were at on the scaffolding." (Appendix 16, pp 43, 70) Kushurin admitted that the scaffolding had passed the height at which the electricians would work on the hydro mobile ***a week before the fall at issue in this case***:

> Q As far as you know, the only people on the scaffold on the day of the accident were the masons; correct?

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A Correct.
Q Do you recall when you had last been on that scaffold before Mr. Dancer fell?
A Maybe somewhere around the area of a week.
Q So in the week or so before Dancer fell, you don't recall anybody, other than the masonry people, being on the scaffold; correct?
A Correct.

* * *

Q That scaffold, for that week before the accident, that wasn't a work area for you?
A No.
Q And you don't remember anybody else working on the scaffold?
A No. [Appendix 16, pp 54-55.]

All of the testifying witnesses agreed that no other contractors besides the Liedal & Hart masons used the hydro mobile scaffolding once it reached a height of 20 feet. (Appendix 15, pp 6, 17-18; Jim Schaibly Deposition, Appendix 17, pp 137-188; Tammie Waterman Deposition, Appendix 18, p 102-103) Therefore, in the light most favorable to the plaintiffs, the hydro mobile scaffolding had been used solely by one trade for approximately a week. (Appendix 16, pp 54-55) The hydro mobile was at approximately 40 feet at the time of Dancer's fall. (Appendix 4, ¶ 12)

### III. DANCER'S FALL

The incident in question in this matter occurred on August 9, 2010. (Appendix 4, ¶ 12) On that day, Liedal & Hart was using the hydro mobile scaffolding to work on a concrete block wall 40 feet in the air. (Appendix 4, ¶ 12; Appendix 8, p 22; Appendix 18, p 104) Plaintiffs have conceded that no other trades were using the hydro mobile that day: "Employees from other subcontractors were not on the scaffold that morning." (Plaintiffs' Brief on Appeal, p 21) In fact, there were no other trades even working in the area of the wall that morning. (Appendix 12, p 28)

Early in the morning on August 9, 2010, other Liedal & Hart employees had used the hydro mobile without any problems. There were no openings or problems with the planking because the Liedal & Hart employees were walking and standing on the planking without

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incident. (Appendix 10, pp 13-14, 38; Appendix 12, p 111) The hydro mobile had also been inspected that morning by a component person for Liedal & Hart who cleared it for work. (Appendix 12, p 51; Appendix 13, p 25)

Liedal & Hart employees then took their usual break at 9:30 a.m. Because it had started raining that morning, Nick Martin, the Liedal & Hart, foreman called off work for the day because the weather affected the masonry work. Martin just kept a few workers to prepare for the next day. (Appendix 10, pp 19-21; Appendix 12, pp 26-27) Dancer was among the people that Martin asked to stay at work that morning. (Appendix 12, p 27) Only he and the crane operator, Glenn Johnson, returned to the work area. Dancer returned to the hydro mobile while Glenn Johnson returned to his crane. (Appendix 10, pp 5, 25-26) Nick Martin, Liedal & Hart's foreman, assigned Dancer to raise the hydro mobile. He did not assign anyone else to do this with Dancer or to supervise Dancer. (Appendix 12, pp 29-30) Martin went to the work trailer to look at blueprints while the other two remaining workers were assigned cleaning tasks. (Appendix 12, pp 30-32)

In the process of raising the hydro mobile, typically, the planking for the work platform would not need to be moved. (Appendix 10, pp 43-44) But on the day of his fall, Dancer encountered a clamp and a board used to establish the angle of the wall Liedal & Hart was building. Dancer had to move the planks to get around the clamp. (Appendix 9, p 17; Appendix 10, p 12; Appendix 13, pp 41-42) Glenn Johnson reiterated that Dancer could not raise the hydro mobile without moving the planking. (Appendix 10, pp 44, 79) But when replacing the planking after the move, Dancer failed to properly overlap the planking over the outrigger so that the planks would be properly supported. Glenn Johnson, the eyewitness crane operator explained:

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A These plank that are on top now were over on top of those.
Q Before Mr. Dancer moved them?
A Yes.
Q And then once he moved them, the plankings no longer overlap the braces?
A No. The plank -- these two plank that he moved were no longer overlapped here, but the plank underneath were sticking out and that's -- that's basically why he went down. Because the plank underneath were not on the outrigger here and then he couldn't see that because the plank he slid back were on top of that gap.

* * *

Q Okay. Then you observed Mr. Dancer pull the two planks that are on top or slide those two planks to the right?
A Yes.
Q And that's how the planks existed at the time you previously testified Mr. Dancer walked on the planks from the right side of the photograph to the left --
A Yes.
Q -- stepped on the planks that extended from the left outriggers but were not overlapped with the two planks on top, at least overlapped to the left outrigger, that caused it to tip --
A Yes.
Q -- and Mr. Dancer to fall, grabbed the wall, ultimately lose his grip and wall [sic fell] to the floor?
A Yes. [Appendix 10, pp 30, 33-34.]

Glenn Johnson testified that Dancer created the hazard and that Dancer should have been wearing his fall protection while he was moving the planking:

Q Do you think that Mr. Dancer created a fall hazard when he moved the planking?

* * *

THE WITNESS: Yes, I believe, yes, yes.
Q (BY MR. CUDNEY) Do you think he should have been utilizing fall protection at the time?

* * *

THE WITNESS: I would assume, yes. Yes.
Q (BY MR. CUDNEY) I mean, if you had -- had you done this job before, moved the planking --
A Yes.
Q -- like Mr. Dancer had done?
A Yes.
Q How many times before?
A Numerous times on various jobs, you know.
Q If you had been involved in moving planking like Mr. Dancer did at the height that Mr. Dancer was working at the time before his fall, would you

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have been wearing fall protection?

A Yes. You were supposed to wear it if you're going to be creating a fall hazard, yes.

Q Would you, Glenn Johnson, have been wearing a harness and have it attached to the -- what did you call it, the retractable?

A Yes.

* * *

Q You were asked some questions about the use of fall protection, and you observed this whole thing unfold with Mr. Dancer falling. The fall protection is designed so that if he had been wearing his harness and he had been attached to the retractable lanyard he would not have fallen to the ground; would he?

A No.

* * *

Q That system is set up to prevent him from falling to the ground; is it not?

A Yes.

* * *

Q (BY MR. DAVIDSON) And, in fact, based on your experience if he had been wearing his fall protection and if he had been attached to the retractable lanyard, even with him stepping on a plank and falling through he would not have fallen to the ground; would he?

* * *

THE WITNESS: I don't believe so.

Q (BY MR. DAVIDSON) And he wouldn't have been injured; would he?

* * *

THE WITNESS: I don't believe so, no. [Appendix 10, pp 49-50, 63-64.]

Glenn Johnson, who was again the only eye witness, testified that he was sure that it was Dancer who moved the planking that led to the fall hazards and Dancer's subsequent fall:

Q (BY MR. CUDNEY) Did you see Mr. Dancer move these planks that are on the top depicted in the photograph Exhibit D-2?

A Yes.

Q Did you see him move those to the right --

A Yes.

Q -- sometime earlier that day?

A He slid those over. . . .

* * *

Q But you don't have any doubt that it was Ronnie Dancer that moved the planks?

* * *

THE WITNESS: He was the only one up there, yes.

Q (BY MR. CUDNEY) And before he went up there after the break did you observe other masons or mason tenders walk across this plank?

A Yes. That morning, yes.

Q And did they walk across that planking without incident?

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A Yes.
Q In other words, the planking did not flip up --
A No.
Q -- as you described when Mr. Dancer walked across it?
A No.
Q Is that correct?
A Yes.
Q In fact, in your written statement that you produced the day after this incident, Exhibit A, you write foot plank must have been moved because bricklayers were on scaffold working that morning. Is that correct?
A Yes.

* * *

Q Do you think that Mr. Dancer created a fall hazard when he moved the planking?

* * *

THE WITNESS: Yes, I believe, yes, yes.

* * *

Q (BY MR. DAVIDSON) So based upon your observations, you saw Mr. Dancer moving the planking; correct?
A Yes.
Q And between the time you saw him move planking and the time he fell, no one else was on the scaffold?
A No.
Q No one else was moving the plank?
A No.
Q So whether Mr. Dancer realized it or not, he's the one that created that fall hazard; isn't he?

* * *

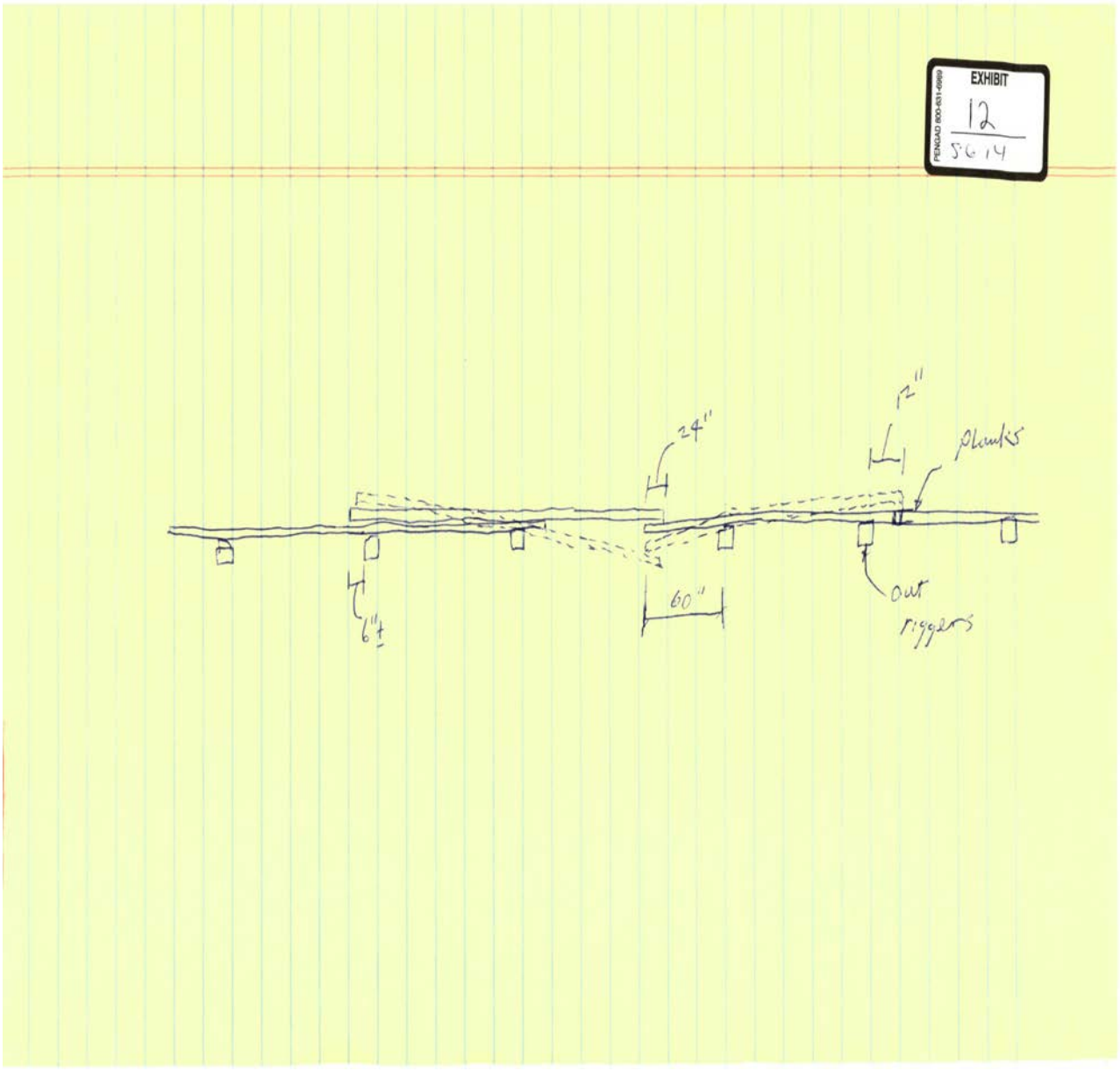
THE WITNESS: Yes. [Appendix 10, pp 29-30, 38, 49, 64.]

All other witnesses testified consistently with Glenn Johnson that Dancer moved the planking that created the fall hazard that led to Dancer's fall and that he should have been using fall protection when he created the hazard. (Appendix 9, pp 17, 34-35; Appendix 12, pp 25, 40-42, 111, 124, 126-127; Appendix 13, pp 26-27, 42; Appendix 14, pp 64-65, 119-120; Appendix 17, p 111; Appendix 18, pp 92-93) Dancer testified that he did not have any memory of the events. (Appendix 8, p 17) ***But Dancer previously admitted to Brad Leidal of Leidal & Hart that he had moved the planking***:

Q He did tell you he moved some planks though?
A Yes. [Appendix 7, p 35.]

Plaintiffs' expert Michael Wright also testified regarding plaintiffs' theory regarding how the accident occurred and offered an opinion and drawing directly consistent with Glenn Johnson's testimony regarding Dancer creating the hazard by moving the planking so that it did not properly overlap the outriggers for support:

> Q. All right. We've got Exhibit No. 12 here, and what you're doing is giving your opinion as to what -- how Ronnie Dancer laid down the boards that morning that would have allowed the board to flip up as Glen Johnson, the crane operator, testified. Is that a fair assessment?
> A. Yes. [Michael Wright Deposition, Appendix 19, p 89.]

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Thus, there is no dispute regarding how the accident happened and that Dancer created the risk that he faced at the time of the incident. There is also no dispute that Dancer was alone on the scaffolding at the time of the incident. Glenn Johnson, the only eye witness testified:

> Q Was he the only one working on the scaffolding at the time?
> A Yes.
>
> * * *
>
> Q He was the only person on the scaffolding at that time?
> A At that time, yes.
> Q In fact, after break time ended and before or up to the time of his fall was he the only person on the scaffolding?
> A Yes. [Appendix 10, pp 12, 24.]

The other witnesses agreed with Glenn Johnson that no one else was on the scaffolding when Dancer was moving the planking and falling through the gap he created. (Appendix 7, p 35; Appendix 12, pp 29-30, 47; Appendix 13, p 27; Appendix 17, p 111) The only witness to state that there may have been others on the scaffolding with Dancer at the time of his creation of the hazard was Eric Koshurin, the apprentice electrician. But Koshurin admitted that he could not see Dancer at the time he fell because he was around the corner on the other side of a wall and 20 to 30 feet away. (Appendix 16, pp 27, 82) Thus, Koshurin could not offer testimony to state that others faced the same risk as Dancer after Dancer created that risk. Instead, the only eye witness testimony is from Glenn Johnson who repeatedly testified that Dancer was alone. (Appendix 10, pp 12, 24)

Glenn Johnson also offer testimony that, even if BBC and Clark had been in the area of the hydro mobile at the time of the fall, they would not have been able to see that the hazard existed before Dancer's fall:

> A At the time he had fallen all the plank were in position here. There was no openings, visual openings as I looked up.
> Q Understood.
> A When he fell.
> Q So that when he fell it looked to you like the plank was all in place?
> A Yes. From what I could see, yes.

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Q All right.
A This is, you know, after the accident, obviously.

* * *

Q I think you said when we first started that at the time he fell there were no gaps that you saw; true?
A No, there were no gaps there at the time. It was all -- visually all the plank were in place from the ground from what I could see.
Q Okay. It appeared to be that everything was properly placed from where you were?
A I mean, yes, from a quick visual look, yes, but. [Appendix 10, pp 78, 80.]

Dancer's improper placement of the planking on the hydro mobile only existed for minutes as Nick Martin testified that everything was fine 20 minutes beforehand:

Q All right. But you know that from what you were told and as you report in your notarized statement, you believed that he had readjusted planks on that lower -- that lower level of the platform; true?
A He must have.
Q Okay. And did you reach that conclusion because he just must have or because Glenn Johnson said he saw him do it?
A I didn't know. ***He must have moved them because there were people working on the same exact platform 20 minutes before that and nobody else was up there except for him***.
Q And you -- so far as you know there was no opening in the platform at the time he fell; true?
A There was no opening.
Q How do you know that?
A Because there was people working up there 20 minutes before that. [Appendix 12, pp 110-111.]

Thus, in total, the evidence shows that the hazard that led to Dancer's fall was created by Dancer, only existed for minutes, could not be seen by someone on the ground looking at the hydro mobile, and only presented a risk to Dancer who was working alone without his fall protection, despite it availability.

## IV. PROCEDURAL HISTORY

Plaintiffs originally filed suit in Wayne County Circuit Court on December 15, 2011 against Clark. This suit was voluntarily dismissed. (2011 Wayne Register of Actions, Appendix 20) Plaintiffs refiled the case against Clark in Wayne County on January 27, 2012. A motion for

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change of venue was subsequently filed and granted by the Wayne Circuit Court, transferring the case to Kalamazoo Circuit Court. (2012 Wayne Register of Action, Appendix 21) Plaintiffs then filed a second amended complaint, which added BBC to the case. (Appendix 3) After considerable discovery occurred in the case, defendants each filed a motion for summary disposition based on the fact that plaintiffs could not create liability against the general contractor defendants pursuant to the common work area doctrine.

Oral argument occurred on the motions for summary disposition on July 21, 2014. Both defendants argued that the elements of the common work area doctrine, the only raised basis for liability in this matter, did not exist. (Summary Disposition Motion Transcript, Appendix 22) Plaintiffs responded by arguing that defendants were supposedly contractually required to require that Liedal & Hart used bridges rather than the planking for the gaps between the hydro mobiles and that this supposed contractual requirement should somehow be added into the common work area doctrine. (Appendix 22, pp 29-31, 37-39) Defendants responded by pointing out that there was no agreement that any contract provision was breached, and regardless, that plaintiffs could not raise a breach of contract claim but had to prove the elements of the common work area doctrine, which they could not do. (Appendix 22, pp 39-42)

The trial court issued its opinion and order granting defendants summary disposition on September 3, 2014. (Appendix 3) The trial court found that Dancer created the risk when he failed to wear his fall protection and improperly overlapped the planking. It concluded that this did not present a high degree of risk to a significant number of workers because Dancer was the only one to face this risk. (Appendix 3, p 4) The trial court also concluded that Dancer was not in a common work area because other trades had stopped using the hydro mobile at 20 feet, long before Dancer's fall at 35 to 40 feet. (Appendix 3, p 5)

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Plaintiffs filed their claim of appeal on October 27, 2014. (Court of Appeals Register of Actions, Appendix 23) Oral argument occurred on February 2, 2016. The Court of Appeals issued its split unpublished opinion on April 26, 2016. The Court of Appeals majority concluded that it did not matter that other trades had stopped using the hydro mobile scaffolding, essentially concluded that once the hydro mobile was a common work area, it remained a common work area for the project. (Appendix 1, pp 3-4) The majority also concluded that it did not matter that Dancer created the risk that caused his fall because the majority unilaterally determined that the use of unsecured planking to bridge the gaps "was dangerously unstable by its nature," essentially finding that defendants had to meet some standard higher than MIOSHA safety requirements. (Appendix 1, p 9) Judge Wilder dissented noting that Dancer fell from an elevation at which only Liedal & Hart contractors worked, which precluded finding liability under the common work area doctrine. Judge Wilder noted that the majority's conclusion was a "step toward imposing strict liability on general contractors for all hazards on construction sites." (Appendix 2, p 1-2)

Because the Court of Appeals majority failed to follow this Court's binding precedent regarding the common work area doctrine, Clark files this application for leave to appeal.

## ARGUMENT

### I. STANDARD OF REVIEW

"The applicability of a legal doctrine is a question of law that we review de novo." *Ghaffari v Turner Constr Co,* 473 Mich 16, 19; 699 NW2d 687 (2005). This Court reviews decisions to grant summary disposition de novo. *Allison v AEW Mgmt LLP,* 481 Mich 419, 424; 751 NW2d 8 (2008). As this Court has explained:

> A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify

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> recovery. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) should be granted if the evidence submitted by the parties "fails to establish a genuine issue regarding any material fact, [and] the moving party is entitled to judgment as a matter of law." *Id*. at 120; see also MCR 2.116(C)(10). [*Allison*, 481 Mich at 424-425.]

## II. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN SIGNIFICANTLY EXPANDING GENERAL CONTRACTOR LIABILITY FOR CONSTRUCTION SITE ACCIDENTS BY REVERSING SUMMARY DISPOSITION ENTERED BY THE TRIAL COURT FOR DEFENDANTS BASED ON THE COMMON WORK AREA DOCTRINE BECAUSE NONE OF THE FOUR ELEMENTS OF THE COMMON WORK AREA DOCTRINE COULD BE ESTABLISHED IN THIS MATTER

### A. The Starting Point for any Suit Against a General Contractor is That it is Not Liable for Injuries to a Subcontractor's Employees

"It has long been established in Michigan that a person who hires an independent contractor is not liable for injuries that the contractor negligently causes." *DeShambo v Anderson*, 471 Mich 27, 31; 684 NW2d 332 (2004). Rather, "The immediate employer of a construction worker . . . is immediately responsible for job safety." *Funk v Gen Motors Corp*, 392 Mich 91, 102; 220 NW2d 641 (1974). The Michigan Occupational Safety & Health Act provides that it is the *employer's* duty to provide each employee with a safe place to work. MCL 408.1011. In addition, employees in Michigan are protected pursuant to the Michigan Workers' Compensation Act by workers' compensation insurance provided by their employer, as Dancer was in this case. MCL 418.301; *Simpkins v Gen Motors Corp*, 453 Mich 703, 710; 556 NW2d 839 (1996). As this Court succinctly explained, a general contractor cannot be held liable for injuries to a subcontractor's employee at common law: "At common law, property owners and general contractors generally could not be held liable for the negligence of independent subcontractors and their employees." *Ghaffari*, 473 Mich at 20. This Court, however, has created two narrow exceptions to the general rule of nonlialbity for general contractors: 1) the common work area doctrine recognized in *Funk*; and 2) the inherently dangerous activity doctrine as recognized in *DeShambo*. The inherently dangerous activity doctrine is not at issue

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in this matter. ***The only issue is if Dancer can obtain recovery beyond the protections of workers' compensation through the application of the common work area doctrine***.

The common work area doctrine consists of four elements:

> (1) that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Ormsby v Capital Welding Inc*, 471 Mich 45, 57; 684 NW2d 320 (2004).]

Although it is called the common work area doctrine, this Court has made clear that the plaintiff must prove each and every one of these elements in order to survive summary disposition:

> It is potentially confusing and, indeed, may have misled some courts, that a test with four elements has been referred to by only one of its elements-the "common work area." What is commonly referred to as the "common work area doctrine," however, has four separate elements, *all* of which must be satisfied before that doctrine may apply. [*Id*. at 59 n11, emphasis original.]

In this matter, the trial court properly granted defendants summary disposition as plaintiffs cannot carry their burden of showing that any of the four elements existed.

### B. The Basic Purpose of the Common Work Area Doctrine Does Not Apply in This Case

In creating the common work area doctrine exception to nonliability, this Court recognized that the end goal was not just to find another source of recovery for the plaintiff, but to create a system intended to properly encourage safety on future job sites: "The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury." *Funk*, 392 Mich at 104. The Court recognized that, in a common work area where multiple trades are working, an individual subcontractor may not have the authority to rectify a safety hazard on its own:

> "[A]s a practical matter in many cases only the general contractor is in a position to coordinate work or provide expensive safety features that protect

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> employees of many or all of the subcontractors. * * * [I]t must be recognized that even if subcontractors and supervisory employees are aware of safety violations they often are unable to rectify the situation themselves and are in too poor an economic position to compel their superiors to do so." *Alber v Owens*, 66 Cal 2d 790; 59 Cal Rptr 117, 121-122; 427 P2d 781 (1967). [*Funk*, 392 Mich at 104.]

Under this precedent, this Court created the narrow exception to nonliablity because, in areas where multiple trades are working at the same time, the work may fall under the adage that when everyone is in charge, no one is in charge as none of the individual multiple subcontractors would have the authority or the ability to enforce all of the necessary safety measures. In such circumstances, because the general contractor oversees the multiple trades, it would be the only party with the ability to properly enforce safety requirements on everyone working in the area. This is a reasonably and laudable goal. But the Court of Appeals majority lost sight of this purpose in this case, unnecessarily expanding the narrow exception to a situation where it just does not belong.

This case does not present a situation where no subcontractor would be able to individually "rectify the situation themselves." *Id*. Instead, ***it is undisputed that Liedal & Hart was in complete control of the hydro mobile scaffolding***. Liedal & Hart owned, erected, and maintained the hydro mobile. (Appendix 9, pp 27-28; Appendix 10, p 52) Liedal & Hart had two competent persons on the project to inspect the scaffolding each day, Nick Martin, the job foreman, and Mike Wiejach, a certified scaffold erector. (Appendix 12, p 12; Appendix 13, p 45) John Stewart of MIOSHA testified that it was not the responsibility of either BBC or Clark to employ a competent person for the project. The responsibility was Liedal & Hart's. (Appendix 13, pp 18-21) Liedal & Hart were the experts in scaffolding erection and raising and lowering the hydro mobile. (Appendix 14, p 134; Appendix 6, pp 46-47, 50) ***Simply, Liedal & Hart were in complete control of the hydro mobile scaffolding***. In fact, Nick Martin, Liedal & Hart's foreman, testified that ***other trades had to ask permission of Liedal & Hart before they***

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***could ever come on the hydro mobile***:

> Q (BY MR. DAVIDSON) And if any other trade wanted to use your scaffold they would have to get permission from you?
> A Absolutely. [Appendix 12, p 118.]

The responsibility for safety on the hydro mobile is most efficiently placed on the owner, operator, and expert in the use of that hydro mobile. This is especially true given that Liedal & Hart was in completely control of who could use the hydro mobile and when they could use it. Because this is a situation where one subcontractor could, and did, control any safety issues presented by the hydro mobile, ***the common work area doctrine is not applicable at all***. The Court of Appeals should be reversed simply based on the fact that the purpose of the common work area doctrine is not advanced by its application to cases such as the one at hand and was never intended by this Court to extend as far as the Court of Appeal majority extended it in this case.

### C. Plaintiffs' Reliance on Supposed Contractual Requirements Beyond the Common Work Area Doctrine are Completely Irrelevant

Throughout this case, plaintiffs have focused their attack on whether defendants complied with various contractual requirements that plaintiffs allege exist in myriad documents and contracts existing for the project. (See Plaintiffs' Appellant Brief, pp 2-8, 10-14, 20) Defendants have repeatedly disputed the interpretation and application of these supposed contractual rules relied on by plaintiffs in this matter. But the Court of Appeals majority appear to have been distracted by this issue. (Appendix 1, p 2) In the end, this distraction regarding the contents of defendants' contracts is completely irrelevant to the case at hand. Plaintiffs have no right to attempt to enforce the contents of any such contract. Plaintiffs did not even raise a breach of contract claim in their second amended complaint. (Appendix 4)

The only issue in this case is whether or not the common work area doctrine applies:

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"We made clear in *Ormsby* that ***only*** when this test is satisfied may a general contractor be held liable for the alleged negligence of the employees of independent subcontractors with respect to job site safety." *Ghaffari*, 473 Mich at 21, emphasis added. The contractual provisions or requirements have nothing to do with common work are doctrine.[2]

Plaintiffs' attempt to create tort liability based on an alleged violation of a contract would also violate this Court's holdings in *Fultz v Union-Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004) and *Loweke v Ann Arbor Ceiling & Partitions Co LLC*, 489 Mich 157; 809 NW2d 553 (2011). In *Fultz*, this Court explained that, in order for a tort cause of action to exist based on the failure to comply with a contract, there must be a separate and distinct duty alleged by the plaintiff. *Fultz*, 470 Mich at 467. The Court explained that such a separate and distinct duty cannot be based on a mere failure to perform a contractual duty. *Id*. at 468. Instead, only the creation of a new hazard in the performance of the contract raises the separate and distinct duty

[2] Although unpublished Court of Appeals cases are obviously nonbinding, they do help to show that this rule of law is well accepted in Michigan as such cases have repeatedly rejected such attempts to engraft contractual requirements into the common work area doctrine type cases. See *Leffler v HTNB Corp*, unpublished memorandum opinion of the Court of Appeals, issued March 18, 2008 (Docket No. 275962) (Appendix 24) ("The incidental mention of quality control and compliance with plans and specifications was not intended to benefit this specific plaintiff because there was no 'direct' promise to him or a class of persons like him"); *Zarazua v Leitelt Iron Works, Inc*, unpublished opinion per curiam of the Court of Appeals, issued May 16, 2006 (Docket No. 266022), lv den 477 Mich 1055 (2007) (Appendix 25) ("Zarazua's benefit of increased safety at work is only an incidental benefit to the contract's stated benefit that GRMR provide MiCo with an inspection report for its records. Accordingly, Zarazua is not an intended third-party beneficiary to the contract between MiCo and GRMR."); *Seafoss v Christmas Co*, unpublished opinion per curiam of the Court of Appeals, issued November 18, 2004 (Docket No. 249925) lv den 472 Mich 940 (2005) (Appendix 26) ("In the instant case, nothing in the contracts between Christman and Douglas Steel or Douglas Steel and Citisteel can be construed as an express promise that either defendant would act to provide for plaintiff's safety. Thus, no genuine issue of material fact exists and defendants are entitled to summary disposition"); and *Wallington v City of Mason*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 2006 (Docket Nos. 267919, 269884), lv den 479 Mich 860 (2007) (Appendix 27) ("Plaintiff was not a party to the Water Main Contract. But plaintiff's allegations against defendant Elm stem entirely from the latter's ostensible duties under this contract. Plaintiff has failed to allege or present evidence of a duty defendant Elm owed him independent of the contract.")

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necessary to bring a tort action. *Id*. at 469. In *Loweke*, this Court again explained that nonfeasance of a contract does not create tort liability:

> Accordingly, in cases of nonfeasance, a defendant who fails to perform his contractual duties is ordinarily not liable in tort because, as a general tort rule, "there is no duty that obligates one person to aid or protect another." *Williams*, 429 Mich at 498-499. As a result, when a defendant completely fails to perform his contractual obligations, "[w]hat we are left with is defendant's failure to complete his contracted-for performance," which "is not a duty imposed by the law upon all, the violation of which gives rise to a tort action" but, instead, is "a duty arising out of the intentions of the [contracting] parties themselves and owed only to those specific individuals to whom the promise runs." *Hart v Ludwig*, 347 Mich 559, 565-566, 79 NW2d 895 (1956). [*Loweke*, 489 Mich at 164.]

In this case, plaintiffs allege nothing more than that BBC and Clark allegedly failed to comply with duties created by a contract. Defendants do not concede that such nonfeasance existed in this case, but even if it had, plaintiffs' tort suit based on that nonfeasance would be meritless pursuant to the well-established precedent from this Court.[3]

Plaintiffs also could not argue that Dancer was somehow a third-party beneficiary of the construction contracts. MCL 600.1405(1) states that a third party beneficiary must be made explicitly clear in Michigan: "A promise shall be construed to have been made for the benefit of a person whenever the promisor of said promise has undertaken to give or to do or refrain from doing something directly to or for said person." This Court has explained this statute:

> Simply stated, section 1405 does not empower just any person who benefits from a contract to enforce it. Rather, it states that a person is a third-party beneficiary of a contract only when the promisor undertakes an obligation "directly" to or for the person. This language indicates the Legislature's intent to assure that contracting parties are clearly aware that the scope of their contractual undertakings encompasses a third party, directly referred to in the contract, before the third party is able to enforce the contract. [*Brunsell v Zeeland*, 467 Mich 293, 297; 651 NW2d 388 (2002), citation omitted.]

[3] See *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 467; 708 NW2d 448 (2005), lv den 474 Mich 1119 (2006), citation omitted: "Plaintiff argues that Hoyt had a duty to remove the pipes once the boards were removed from the archway. However, a failure to act does not give rise to a separate legal duty in tort. Therefore, Hoyt had no actionable duty to remove the pipes. Unless a defendant owes a legal duty to a plaintiff, there can be no tort liability."

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The Court further explained that a class of individuals could be intended third party beneficiaries, but that class has to be "sufficiently described" in the contract. *Id.* "An objective standard is to be used to determine, from the form and meaning of the contract itself, whether the promisor undertook to give or to do or to refrain from doing something directly to or for the person claiming third-party beneficiary status". *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 428; 670 NW2d 651 (2003). The court "should look no further than the form and meaning of the contract itself to determine whether a party is an intended third-party beneficiary". *Id.*

Plaintiffs have relied on excerpts from the EM 385 Safety and Health Requirements. But plaintiffs have failed to cite to anything in these provision that explicitly state that they were created for the benefit of Dancer as required by MCL 600.1405(1). ***And no such language exists***. (Plaintiffs' EM 385 Excerpts, Appendix 28) Under the circumstances, the contractual arguments are completely irrelevant. The trial court properly rejected entanglement in the contractual issue in granting summary disposition to defendants. The Court of Appeals majority erred in reversing this decision.

### D. The Court of Appeals Majority Failed to Properly Focus on the Risk at Issue in the Case

This Court has clearly articulated that the common work area doctrine is an exception to the general rule that general contractors are not responsible for injuries to employees of subcontractors: "The doctrine is understood as an exception to the general rule that, in the absence of its own active negligence, a general contractor is not liable for the negligence of a subcontractor or a subcontractor's employee and that the immediate employer of a construction worker is responsible for the worker's job safety." *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008). This Court went on to explain that the general contractor is not an insurer required to remove every risk that exists on a construction site. Instead, it must merely

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take reasonable steps towards reducing dangers in a common work area:

> To hold that the unavoidable height *itself* was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law. Moreover, because working at heights is generally an *unavoidable* condition of construction work, it cannot, by itself, be the avoidable danger *Funk* described. Hazards, including dangerous heights, are commonplace in construction worksites. In some situations, a general contractor may be able to remove a particular hazard, but general contractors simply cannot remove all potential hazards from a construction workplace. If a hazard cannot be removed, the general contractor can take reasonable steps to require workers to use safety equipment and procedures, thereby largely reducing or eliminating the risk of harm in many situations. [*Id*. at 113-114, emphasis original.]

Thus, the proper identification of the risk at issue is the central consideration in a case dealing with the common work area doctrine. It is not enough for the plaintiff to simply point to a general danger that exists on the site. *Id*. Along the same lines, it is not enough to merely identify a general risk that other subcontractor faced in some fashion. Instead, the plaintiff must demonstrate that the other workers and other subcontractors ***faced the same hazard as caused the plaintiff's injury.***

The Court of Appeals addressed this issue in *Hughes v PMG Bldg Inc*, 227 Mich App 1; 574 NW2d 691 (1997).[4] In that case, the plaintiff was working on a roof overhang that collapsed. The plaintiff attempted to focus on the general nature of the risk so as to include more workers. The Court rejected this and instead, ruled that the other workers must face the exact same hazard as the plaintiff:

> We find that plaintiff has failed to provide evidence suggesting that a general issue of material fact exists regarding whether plaintiff was injured while working in a "common work area." Plaintiff characterizes the alleged danger at issue in this case as "the danger of collapse of the porch overhang." Since other contractors performed work on the exterior of the house in the vicinity of the overhang, plaintiff argues that these workers were exposed to the same risk and that the overhang constituted a "common work area." In support of this argument,

[4] This Court subsequently cited and adopted *Hughes* as properly stating the law regarding the common work area doctrine in *Ormsby*. *Ormsby*, 471 Mich at 57 n9.

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> plaintiff points out that workers from State Carpentry assembled and attached the porch. Another subcontractor, Robert Wurm, installed the siding on the overhang. Yet another contractor would later be pouring the cement for the support stanchions. However, there is no evidence in the record that the employees of any other trade would work on top of the porch overhang. In all probability, after the carpenters built the overhang and attached it to the house, the only workers who would need to gain access to that limited area were the roofers. Thus, giving plaintiff the benefit of any reasonable inferences, ***we cannot say that other workers would be subject to the same hazard***. [*Id*. at 6-7, emphasis added.]

Although not binding, the Sixth Circuit reached the same conclusion when applying Michigan's common work area law in *Smith v BREA Prop Mgmt of Michigan LLC*, 490 Fed Appx 682 (CA 6, 2012). In that case, the plaintiff worked for a siding contractor using scaffolding. An electrical contractor had to access the scaffolding to access a light in the way of the siding. *Id*. at 682-683. After the electrical contractor left the scaffolding, the siding contractor accessed it again that day. In the process of putting a tarp on the scaffolding, wind caught the tarp causing the scaffolding to collapse. Despite the electrician being on the scaffolding shortly before the collapse and despite complaints being raised regarding how the scaffolding was tied to the building throughout the project, the Court found no common work area because the electrician did not face the same risk as the siding contractor because the scaffolding was modified to add the tarp:

> However, Smith has failed to establish that the electrician or the security workers were "subject to the same risk or hazard" as the SDI employees. The electrician, Daniel Szymanski, employed by BREA, filed an affidavit stating that he performed only 10-15 minutes of work, removing a light fixture, while the SDI employees were not working. This was corroborated by the depositions of SDI employees Smith and Pavlinak, who said they took an early lunch break while the electrician worked. The risk or hazard in this case was not that the scaffold would collapse at any point, but that the scaffold might collapse during SDI's efforts to attach the tarp. Thus, the electrician was not subject to the risk posed by the scaffold collapsing—he was not present during the window in which the workers on site were exposed to the risk of the tarp pulling the scaffold away from the building. The security personnel, who were never even seen by the SDI employees, also were not subject to the same risk as Smith. Every deposition taken stated that security workers erected the barriers on site before SDI began its work. At the time of the hazardous activity then, and for several hours before, SDI

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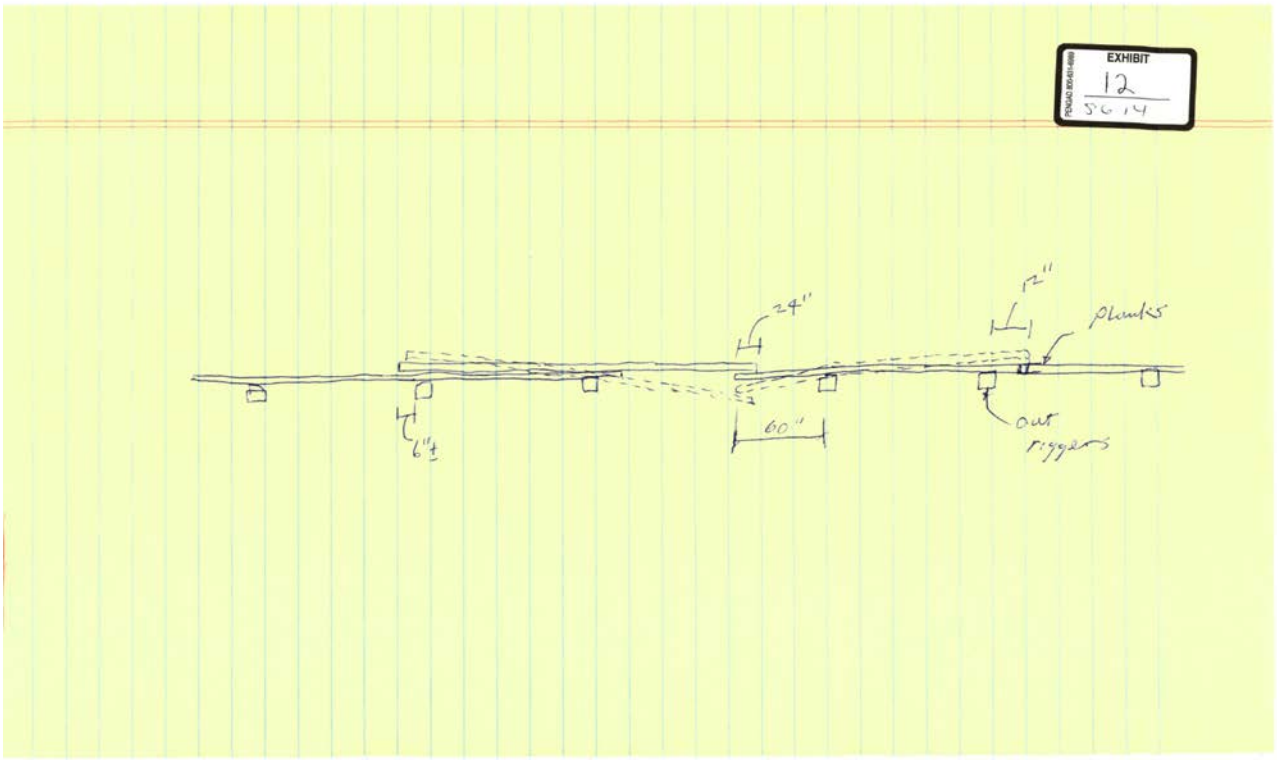
> was the only contractor on the site. There were no other subcontractors subject to the same risk as Smith. Therefore, under Ormsby's rationale, Smith failed to establish that the site was a common work area. [*Id*. at 686.]

Following this precedent, the risk faced by Dancer was being on the hydro mobile without wearing fall protection while planking was improperly placed so as not to be resting on and supported by the hydro mobile outriggers. While plaintiffs have attempted to expand the risk (just as the plaintiff attempted to do in *Hughes*) to cover use of unsecured planking on the hydro mobile at all, this was not what the risk was according to his own expert. Plaintiffs' expert drew the risk faced by Dancer during his deposition (Appendix 19, p 89):




In his testimony, plaintiffs' expert conceded that this risk was not the same as properly laid planking that overlapped the outriggers because the properly laid planking would not flip. (Appendix 19, pp 90-98) Plaintiffs' expert referenced the following photo of in his deposition:

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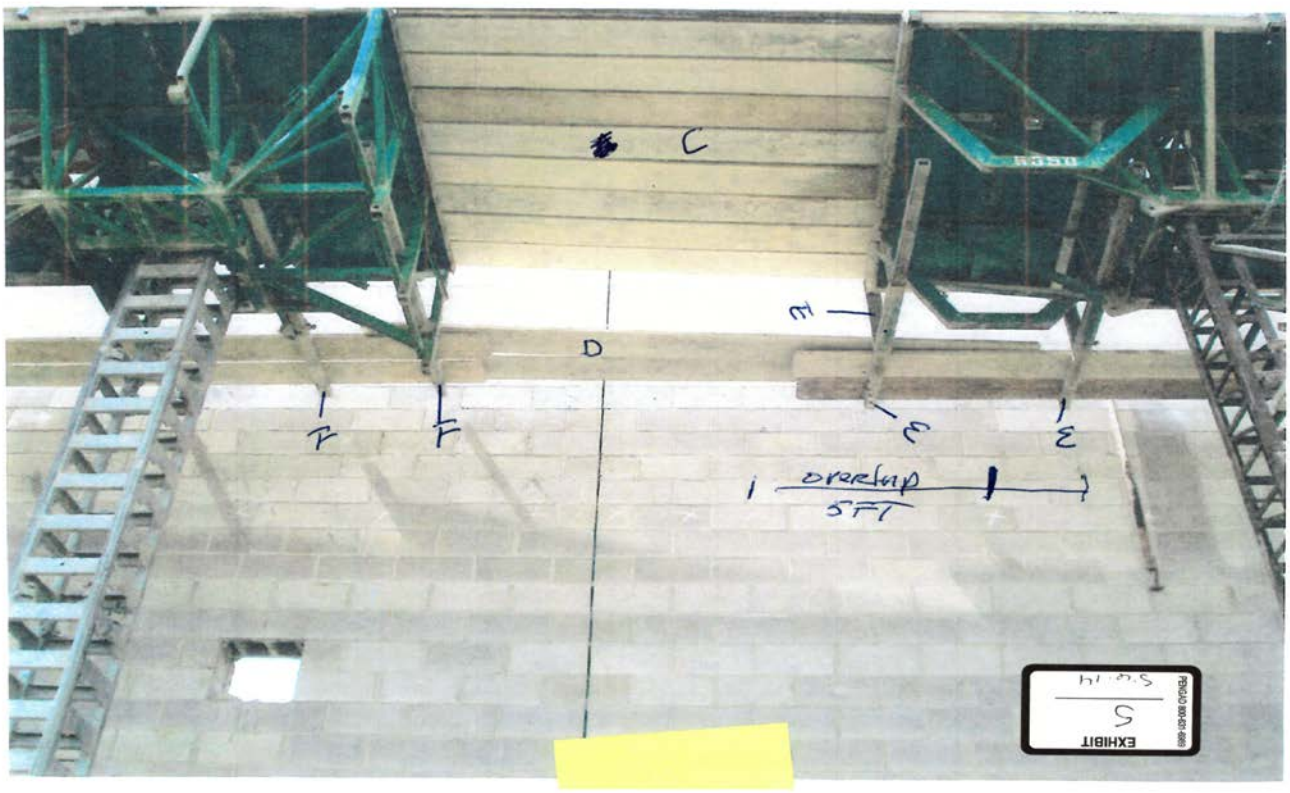


Plaintiffs' expert explained that the planking in this photo would not flip up as led to Dancer's fall in this case:

Q. Okay. So you're explaining to me how this board gets to flip up. Because it doesn't seem physically possible for a board to flip up based upon what we're looking at, right, Exhibit 5?
A. Exhibit 5.
But if you reverse it like I'm showing in Exhibit 12, that's the danger.
Q. What did you reverse?
A. ***See, Exhibit 5 is a perfect setup after the accident by somebody to show how safe they are.***
Q. Well, I thought you said the 60-inch overlap wasn't good.
A. It's not good.
Q. ***But it can flip up?***
A. ***Not in this way, not in Exhibit 5.*** [Exhibit 19, p 93, emphasis added.]

The misplaced planking was how Dancer fell according to plaintiffs own expert. And according to that expert, Dancer's fall could not happen had the planking been pushed over properly onto the outrigger for support. (Exhibit 19, p 93) The expert also conceded that a

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

properly anchored safety lanyard could have also prevented the fall. (Exhibit 19, p 166) Thus, this is the risk at issue in this case, facing improperly placed planking while not wearing proper fall protection. As laid out in the statement of facts, and as discussed below, Dancer was the only one to face this risk that he created.

The Court of Appeals majority erred by failing to consider the actual risk at issue. Instead, the Court of Appeals majority concluded that the planking itself constituted a hazard: "the work surface in question, with its reliance on unsecured planks to bridge gaps, where frequent adjustment of the planks was necessary as the surface was raised or lowered, was dangerously unstable by its nature." (Appendix 1, p 9) By implication, the Court of Appeals majority is ruling that all hydro mobile scaffolding must have secured and tied down planking in order to satisfy the common work are doctrine, ***but this is a standard higher than the industry standard or required by MIOSHA regulations***. These planks were generally not required to be tied down to the outriggers and were only required to be tied down in heavy winds. (Appendix 10, p 95; Appendix 12, pp 47-48, 90) This is standard in the industry. (Appendix 17, pp 111-112) The MIOSHA standard for planking and scaffolding platforms specifically states: "where 16-foot planks are used as prescribed in subrule (7) of this rule, ***tie downs are not required unless wind uplift may occur***." R408.41217(5)(c), emphasis added. In fact, Walter Kyewski, Liedal & Hart's safety director, who had been properly trained in OSHA courses on use of hydro mobile scaffolding, testified that tying down the planking at each out rigger would, in fact, create trip hazards. (Appendix 9, pp 5-6, 8, 54)

The rules for the proper use of the planking was controlled by MIOSHA standards, not the standards set in any particular manual. (Appendix 12, p 70) John Stewart, Senior Safety Officer for MIOSHA, investigated the fall at issue in this case. Stewart saw that planking was

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

used to connect the hydro mobile to each other. He did not find any MIOSHA violations in the way the scaffolding was set up. (Appendix 13, pp 4, 13, 28, 40) John Stewart also testified that MIOSHA would not and could not impose standards higher than this. (Appendix 13, pp 36, 38, 40, 44) Simply, by MIOSHA standards, if the planks are properly in place, the MIOSHA standard are met, but when they are moved, fall protection is required:

> Q. If Ronnie Dancer had put back all the planks in this matter, at that point he's not required to use fall protection. Isn't that true?
>
> * * *
>
> A. That is not correct. It says if it's feasible the fall protection will be provided.
>
> Q. (By MR. BENNER) Well, would it be your position that when the workers are up there standing on those planks that they have to be wearing fall protection?
>
> A. They do not at that point.
>
> Q. Okay. All right. And so if Ronnie Dancer is up there working and the planks have all been replaced, then he's not required to wear the fall protection?
>
> * * *
>
> A. But in the process of replacing them is when the fall protection would be required to be provided and used.
>
> Q. (By MR. BENNER) Okay.
>
> A. If feasible.
>
> Q. Okay. But what I'm saying to you, if he's completed the task of putting the planks back in place, and he's completed that task, he's no longer required to be wearing fall protection?
>
> * * *
>
> A. That is correct, as long as the planks are properly reinstalled.
>
> * * *
>
> Q. As far as you know, based on your investigation, Better Built and Clark complied with all MIOSHA rules as it relates to Mr. Dancer's fall?
>
> * * *
>
> A. As it relates to the accident, I would say that's correct. [Appendix 13, pp 43-44, 46.]

The Court of Appeals majority simply ignored this testimony and the MIOSHA standard and ***created a new industry standard of its own making that that general contractors must now meet to satisfy the common work area doctrine***. It is not enough that a hydro mobile scaffolding be safe, but now all potential risk of working on the hydro mobile must be eliminated. ***This is***

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ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
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***directly contrary to this Court's holding in Latham***: "To hold that the unavoidable height *itself* was a danger sufficient to give rise to a duty would essentially impose on a general contractor strict liability for any injury resulting from a fall from an elevated common work area. This has never been the law." *Latham*, 480 Mich at 113-114, emphasis original.

The Court of Appeals majority only further ignores *Latham* regarding the available fall protection. The majority found that the use of fall protection was not a question to be decided in deciding the common work area issue but is a question of "duty, breach and comparative negligence for resolution at trial." (Appendix 1, p 8) This conclusion is fairly inexplicable. John Stewart's testimony makes the point abundantly clear. Fall protection was required when the planks were moved. It was not required when the planks were properly in place. (Appendix 13, pp 43-44) There is no testimony to the contrary.[5] The Court of Appeals majority's holding on this issue, then, is a direct rejection of this Court's holding in *Latham* that "because working at heights is generally an unavoidable condition of construction work, it cannot, by itself, be the avoidable danger. . . ." *Id*. at 114.

In this case, when the guardrails were in place and the planking was properly in place, the workers were sufficiently protected and no further fall protection was required. But when an opening was made in the planking, Dancer was required to tie off. John Stewart testified that, a harness and lanyard with proper tie off points ***were available to Dancer on top of the hydro mobile on the morning of his fall***. (Appendix 13, pp 22-23, 25) Thus, Dancer was offered sufficient fall protection. He simply chose not to use it on his own. This should end the case in light of *Latham*. *Id*.

[5] This testimony is consistent with the MIOSHA standards set forth in Part 45 Fall Protection of MIOSHA. This rule adopts OSHA Rule 1926.501(b), which indicates that fall protection could be offered by guardrails or personal fall arrest systems for holes.

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ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
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### E. BBC & Clark Did Not Fail to Take Reasonable Steps

The first element of the common work area doctrine is "that the defendant contractor failed to take reasonable steps within its supervisory and coordinating authority" *Ormsby*, 471 Mich at 57. There is no way that this element can exist in this case as the danger only existed for minutes and could not be seen from the ground. Nick Martin testified that the planking could not have been in the condition it was at the time of Dancer's fall because other workers walked across the same planks 20 minutes before hand. (Appendix 12, pp 110-111) This would have been before the masons came down for their break and were sent home. Dancer then went back up and moved the planking. (Appendix 9, p 17, 34-35; Appendix 10, pp 12, 19-21; 44, 49-50, 63-64, 79; Appendix 12, pp 25-27, 40-42, 11, 124, 167-127; Appendix 13, pp 26-27,41-42; Appendix 14, pp 64-65, 119-120; Appendix 17, p 111; Appendix 18, pp 92-93) Dancer testified that he did not have any memory of the events. (Appendix 8, p 17) ***But Dancer previously admitted to Brad Leidal of Leidal & Hart that he had moved the planking***:

> Q He did tell you he moved some planks though?
> A Yes. [Appendix 7, p 35.]

Thus, the danger presented to Dancer could have only possibly existed for minutes. And this was on a rainy day when other workers had been sent some. There is simply no evidence to support the conclusion that Clark or BBC had any opportunity to take any steps to guard against Dancer's fall. Therefore, the trial court properly granted summary disposition.

Moreover the facts show that BBC and Clark did take reasonable steps. It is undisputed that a safety program was in place. The evidence also clearly shows that Dancer had a safety harness and lanyard available to him not just at the worksite, ***but on the actual hydro mobile scaffolding***. (Appendix 13, pp 22-23, 25) Simply, Dancer created the risk and should have been wearing the fall protection equipment available to him when he did so. (Appendix 9, pp 17, 34-

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35; Appendix 10, pp 29-30, 38, 49, 64; Appendix 12, pp 25, 40-42, 111, 124, 126-127; Appendix 13, pp 26-27, 42; Appendix 14, pp 64-65, 119-120; Appendix 17, p 111; Appendix 18, pp 92-93) Given this testimony, BBC and Clark were required to do nothing further. A safe working environment was offered in that Dancer had the safety equipment and the ability to tie off on the scaffolding. (Appendix 13, pp 22-23, 25) Dancer's own choice not to wear the offered fall protection is not the fault of BBC or Clark. And it cannot satisfy the common work area doctrine. *Latham*, 48 Mich at 115.

**F. No Readily Observable Danger Existed**

The second element of the common work area doctrine is the requirement "to guard against readily observable and avoidable dangers. . . ." *Ormsby*, 471 Mich at 57. This Court has explained that "readily observable" is equivalent to "open and obvious": "Yet, one could replace the phrase 'readily observable and avoidable' as used in *Ormsby* with the phrase 'open and obvious' without significantly changing the meaning of this passage." *Ghaffari*, 473 Mich at 22. Whether something is open and obviously depends on whether it can be objectively seen on casual inspection: "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This is an objective standard, calling for an examination of the objective nature of the condition of the premises at issue." *Hoffner v Lanctoe*, 492 Mich 450, 461; 821 NW2d 88 (2012), citation omitted.

In this case, Glenn Johnson, the eye witness to the fall testified that there was no opening in the planking that could be seen from the ground:

A At the time he had fallen all the plank were in position here. There was no openings, visual openings as I looked up.
Q Understood.
A When he fell.
Q So that when he fell it looked to you like the plank was all in place?

A Yes. From what I could see, yes.
Q All right.
A This is, you know, after the accident, obviously.

* * *

Q I think you said when we first started that at the time he fell there were no gaps that you saw; true?
A No, there were no gaps there at the time. It was all -- visually all the plank were in place from the ground from what I could see.
Q Okay. It appeared to be that everything was properly placed from where you were?
A I mean, yes, from a quick visual look, yes, but. [Appendix 10, pp 78, 80.]

Plaintiffs' expert agreed with this in his drawing showing the planking overlapping, but not placed on the outrigger (as contained in the brief above). (Appendix 12, p 89) In fact, plaintiffs' expert relied on the fact that Dancer would not have been able to see the problem when he moved the planking: "What -- when you install boards, when you're walking on the boards you can't tell where the outriggers are readily. And if you're not a skilled -- like a competent person in scaffolding, you're not trained -- there is little clues you can see. But if you're a laborer, you won't see these. So when you're on top of the boards, you overlap them, but you have no idea what you're overlapping." (Appendix 12, p 90) Given this testimony, there is no possible way that BBC and Clark could have seen the danger on casual inspection, especially given that it only existed for a matter of minutes. Therefore, the trial court properly granted defendants summary disposition because plaintiffs are required to prove every element of the common work area doctrine. *Ormsby*, 471 Mich at 59 n11.

### G. A Significant Number of Workers Did Not Face a High Degree of Risk from the Risk Created by Dancer in Moving the Planking Without Wearing the Fall Protection Available to Him

The third element of the common work area doctrine involves a danger that "created a high degree of risk to a significant number of workmen. . . ." *Id*. at 471 Mich at 57. As discussed above, the Court of Appeals majority failed to proper focus on the actual risk at issue. Instead of considering the danger that led to Dancer's fall, the failure to wear fall protection



HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

when planking on the hydro mobile was not properly in place over the outringger, the Court of Appeals majority essentially considered working on the hydro mobile itself to be the risk in question. (Appendix 1, p 9) This is directly contrary to this Court's holding in *Latham* that risks inherent to the construction industry cannot constitute a risk sufficient to satisfy the common work area doctrine. *Latham*, 480 Mich at 113-114.

The Court of Appeals majority and plaintiffs have relied on the testimony of Eric Koshurin who was an apprentice electrician on the Fort Custer project. (Appendix 1, pp 2, 9) Specifically, Koshurin testified: "I stepped on the edge of a board and another individual was on the other end and he ended up raising up and we both kind of danced back and forth till we both landed on something solid." (Appendix 16, p 18) Koshurin's testimony about what supposedly occurred when he stepped on the planking in inherently different than what occurred with Dancer. Koshurin did not testify that the planking was improperly set so as not to rest on the outrigger. Koshurin also never stated that there was a gap or an opening in the planking that would have required him to wear his fall protections as occurred with Dancer. Instead, he indicated that the planking came back down on "something solid" i.e. the outrigger.[6] (Appendix 16, p 18)

What Koshurin, and, in turn, plaintiffs, was really objecting to are the MIOSHA standards allowing for planking to be placed on the hydro mobile scaffolding without being tied down. Again, the MIOSHA standard for planking and scaffolding platforms specifically states: "where 16-foot planks are used as prescribed in subrule (7) of this rule, ***tie downs are not required unless wind uplift may occur***." R408.41217(5)(c). Such 16-foot long planking was used in this case. (Appendix 12, pp 47-48, 90) Koshurin, plaintiffs, and the Court of Appeals

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

majority in relying on Koshurin's testimony were demanding something greater than the industry standard in this state. But the Court of Appeals has no right to rewrite MIOSHA standards. Such standards are controlled by the Michigan Occupational Safety and Health Act, MCL 408.1001, *et seq*. and the rules created by the director as allowed by MCL 408.1069. The Court of Appeals majority overstepped its authority by essentially negating R408.41217(5)(c) and reading it out of existence in concluded the lack of tie downs meant that the hydro mobile was "dangerously unstable by its nature." (Appendix 1, p 9)

The same is true regarding the use of guardrails and personal fall arrest systems. Pursuant to MIOSHA Chapter 45 and OSHA Rule 1926.501(b), the guardrail system is sufficient fall protection until a hole is opened which is not guarded by that guardrail system. At that point, either a new guardrail must be put in place to block the hole or a personal arrest system is required. Thus, while the planking is being moved, the guardrails are not sufficient and the person moving the planking should be wearing his fall protection personal arrest system. Dancer failed to do this in this case, and this is what caused his injuries. No question of fact exists on this point given the consistent testimony of all the witnesses on issue is that Dancer created the hazard, had fall protection to use, but did not do so, which led to his injuries. (Appendix 9, pp 17, 34-35; Appendix 10, pp 29-30, 38, 49, 64; Appendix 12, pp 25, 40-42, 111, 124, 126-127; Appendix 13, pp 26-27, 42; Appendix 14, pp 64-65, 119-120; Appendix 17, p 111; Appendix 18, pp 92-93) The Court of Appeals majority erred as a matter of law in ignoring the actual testimony of these witnesses and ignoring the actual regulations regarding the use of the hydro mobile scaffolding.

When one considers the actual risk at issue in this case, the failure to properly overlap the

[6] Koshurin was young and inexperienced and likely just was not used to walking on planking on

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ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
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16-foot long planks to properly rest on outriggers, while not wearing fall protection, there can be no high degree of risk to a significant number of workers. Glenn Johnson, the only eye witness testified that Dancer was the only person on the scaffolding when Dancer moved the planking:

> Q Was he the only one working on the scaffolding at the time?
> A Yes.
>
> * * *
>
> Q He was the only person on the scaffolding at that time?
> A At that time, yes.
> Q In fact, after break time ended and before or up to the time of his fall was he the only person on the scaffolding?
> A Yes. [Appendix 10, pp 12, 24.]

The other witnesses agreed with Glenn Johnson that no one else was on the scaffolding when Dancer was moving the planking and falling through the gap he created. (Appendix 7, p 35; Appendix 12, pp 29-30, 47; Appendix 13, p 27; Appendix 17, p 111) The only witness to state that there may have been others on the scaffolding with Dancer at the time of his creating of the hazard was Eric Koshurin, the apprentice electrician. But he admitted that he could not see Dancer at the time he fell because he was around the corner on the other side of a wall and 20 to 30 feet away. (Appendix 16, pp 27, 82) Thus, Koshurin could not offer testimony to state others faced the same risk as Dancer after Dancer created that risk. What Koshurin was actually testifying to was the masons who were on the scaffolding ***before the break***, who were then sent home leaving only Dancer to go back up on the scaffolding. At that point, the only eye witness testimony is from Glenn Johnson who repeatedly testified that Dancer was alone. (Appendix 10, pp 12, 24)

This Court has indicated that the number of workers should be judged at the time the plaintiff was injured: "The high degree of risk to a significant number of workers must exist when the plaintiff is injured; not after construction has been completed." *Ormsby*, 471 Mich at

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a scaffolding. But regardless, his testimony does not support plaintiffs' claims.

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59 n12. Thus, the relevant consider is who will face the danger as it existed at the time of the injury. At the time of the injury Dancer was alone on the hydro mobile scaffolding and was the only one to face the risk. This cannot meet the significant number requirement. *Id*. The simple fact is that, prior to Dancer moving the planking, the danger could not exist because other people used the planking. A review of the picture of the risk drawn by plaintiffs' expert contained above demonstrates that it would have been physically impossible for someone to stand on that unsupported planking without falling through. (Exhibit 19, 89-90) Not only were there no other falls that day, it is undisputed that there had never been any other falls on the project. Therefore, no one had faced the risk before Dancer's fall. After the fall, no one would ever face this same risk again because the boards fell down with Dancer. (Appendix 10, p 28) Thus, the next person on the hydro mobile scaffolding would not face the improperly placed planking because the planking was gone. Further, they could use the fall arrest system that was on the hydro mobile scaffolding at the time of the fall. (Appendix 13, pp 22-23, 25) Thus, no one else could face this same risk

This Court has ruled that six workers were not a significant number:

> The Court of Appeals erred by holding that the common-work-area doctrine applies to this case. The risk of injury at issue here was the risk of electrocution from a subcontractor's crane coming into contact with power lines above the construction site. The only employees exposed to the risk of electrocution were two to six employees of one subcontractor, including the plaintiff, and therefore there was not a high degree of risk to a significant number of workers. [*Alderman v JC Dev Cmtys, LLC*, 486 Mich 906; 780 NW2d 840 (2010).[7]]

[7] In fact, this Court has denied leave in a case in which the Court of Appeals concluded that 15 individuals were not considered a significant number. *Faulman v American Heartland Homebuilders, LLC*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 269287), lv den 477 Mich 1116 (2007) (Appendix 29). Although this is not binding precedent, it helps to demonstrate that this Court has thought to be a significant number in the past. Even cobbling together everyone who had been on the scaffolding at some time, the

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
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Dancer facing the risk he created by himself alone cannot possibly meet the significant number requirement. The Court of Appeals erred as a matter of law and should be reversed.

### H. Dancer was Not in a Common Work Area

The final element of the common work area doctrine is that the claimed injury occur in a common work area. *Ormsby*, 471 Mich at 57. This requirement is based on the policy reasoning discussed above from *Funk* that, in areas were multiple trades are working in the same location, no one trade may be able to properly protect its workers as it would not have complete control over the area or the ability to control the other subcontractors' workers. *Funk*, 392 Mich at 104. As discussed above, this reasoning does not apply to this case as it was undisputed that Liedal & Hart was in complete control of the hydro mobile scaffolding to the point that its permission had to be obtained before any other subcontractor could use the hydro mobile. (Appendix 6, pp 46-47, 50; Appendix 9, pp 27-28; Appendix 10, p 52; Appendix 14, p 134) Under the circumstances, the hydro mobile scaffolding could not be a common work area as intended in *Funk*. *Id.*

But even if the purpose of the common work area doctrine and Liedal & Hart's control of the hydro mobile scaffolding were ignored, there would still be no common work area in this case. Plaintiffs' claims that a common work area existed primarily relies on the testimony of Kushurin, the electrical apprentice. Kushurin claimed that he and his foreman worked on the hydro mobile to run pipes/conduit and install some electrical boxes. (Appendix 16, pp 10-11, 38) Kushurin admitted, however, that the electricians would not be on the hydro mobile once it passed 20 or 25 feet in height. (Appendix 16, p 11) Kushurin later reiterated that the electricians were not on the hydro mobile scaffolding once it passed 20 feet in height: "Yes. I think 20 foot

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Court of Appeals majority could only find 15 workers, which is not a significant number, especially since none of them faced the same risk as Dancer.

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would be the highest that we were at on the scaffolding." (Appendix 16, pp 43, 70) Kushurin admitted that the scaffolding had passed the height when the electricians would work on the hydro mobile ***a week before the fall at issue in this case***:

> Q As far as you know, the only people on the scaffold on the day of the accident were the masons; correct?
> A Correct.
> Q Do you recall when you had last been on that scaffold before Mr. Dancer fell?
> A Maybe somewhere around the area of a week.
> Q So in the week or so before Dancer fell, you don't recall anybody, other than the masonry people, being on the scaffold; correct?
> A Correct.
>
> * * *
>
> Q That scaffold, for that week before the accident, that wasn't a work area for you?
> A No.
> Q And you don't remember anybody else working on the scaffold?
> A No. [Appendix 16, pp 54-55.]

All of the testifying witnesses agreed that no other contractors besides the Liedal & Hart masons used the hydro mobile scaffolding once it reached a height of 20 feet. (Appendix 15, pp 6, 17-18, 28, 57; Appendix 17, pp 137-188; Appendix 18, p 102-103) Therefore, in the light most favorable to the plaintiffs, the hydro mobile scaffolding had been used solely by one trade for at least a week. (Appendix 16, pp 54-55) Simply, the only reasons that any other trades would access the hydro mobile scaffolding is to access the wall to install conduits and piping. But this would only be necessary at the lower levels. As the walls grew in height over time, there would be no need to access the hydro mobile by anyone other than Liedal & Hart, the masonry contractors. ***For at least a week before the fall, Liedal & Hart were by themselves on the hydro mobile at a height above which any other subcontractor would access the hydro mobile. Given that only one contractor was on the hydro mobile, it was not a common work area.***

What the Court of Appeals majority has essentially concluded is that, once an area

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

becomes a common work area, it must stay a common work area throughout the project. This expansive reading of the common work area doctrine is inconsistent with the purpose of the narrow exception created in *Funk*. *Funk*, 392 Mich at 104. And it has been rejected by other Courts: "it is not true that a location always remains a common work area. Even if there is an obvious danger in a particular location, there becomes a point at which there is no longer a 'high degree of risk to a significant number of workers,' because the workers have ceased working in the common work area." *Sprague v Toll Bros*, 265 F Supp 2d 792, 800 (ED Mich, 2003).[8] In *Sprague*, at least three other trades had accessed the same roof area where the decedent was working when he fell to his death. But the evidence showed that the work of the other trades was completed prior to the fall. *Id*. Based on these facts, the Court concluded: "In short, while the greenhouse roof area may have been a 'common work area' at one time, there is no evidence to demonstrate that it was at the time of the incident." *Id*. The same reasoning applies to the case at hand. Whether or not other subcontractors worked on the hydro mobile scaffolding at lower levels and at earlier times, at the time of Dancer's fall, it is undisputed that no other trades would be working on the hydro mobile. Therefore, it could not be a common work area.

The Court of Appeals dissenting opinion correctly stated:

> Here, the evidence, viewed in the light most favorable to plaintiff as the nonmoving party, establishes that plaintiff was not injured in the "same" area where employees of two or more subcontractors had worked; rather, he was injured in an area where the employees of only one subcontractor, Leidal & Hart, had worked. Moreover, there is no record evidence that employees of other subcontractors would "eventually" work on the scaffold at that same elevation. Hence, plaintiff was not injured by a danger that was present in a "common" work area, see *Candelaria* [*v BC Gen Contrs Inc*], 236 Mich App at 75, and summary disposition in favor of defendants was appropriate. [Appendix 2, p 2.]

The Court of Appeals majority should be reversed for the reasons stated by the dissent.

[8] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v 3M*, 235 Mich App 347, 360 n 5; 597 NW2d

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

## I. This Case is of Significant Public Interest and Involves an Issue of Major Significance to the State's Jurisprudence

Pursuant to MCR 7.305(B)(2) and (3), this case is appropriate for consideration by this Court because it raises significant issues of public interest and legal principles of major importance. The common work area doctrine is a very important issue of law that affects enumerable construction projects throughout the state. As Judge Wilder stated in his dissent, the majority opinion significantly expanded the narrow common work area doctrine towards "imposing strict liability on general contractors for all hazards on construction sites." (Appendix 2, p 2) This expansion of the common work area doctrine is contrary to all precedent from this Court and should not be allowed to stand. It is a ruling detrimental to the entire construction industry in this state, and may disincentive businesses from working as general contractors in our state. The majority opinion also created confusion regarding what safety standards the general contractor must meet on a project as it requires a standard higher than MIOSHA standards impose.

This Court should further address this case because it deviated from another recent Court of Appeals case dealing with the nearly identical issue of application of the common work area doctrine to a claim involving an injured party who created the risk that lead to his injury on a hydro mobile. In *Felty v Skanska USA Bldg Inc*, unpublished opinion per curiam of the Court of Appeals issued July 19, 2011 (Docket No. 297991) (Appendix 30),[9] Felty worked for a masonry subcontractor on a large project at the University of Michigan. The masons were working on a hydro mobile scaffolding, which had to be moved during the day. When setting the hydro

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250 (1999).

[9] This unpublished case is not cited for binding precedent but instead to show that the majority opinion in the case at hand conflicts with the earlier holding on nearly identical factual grounds. Although unpublished cases are not binding, they are often used by lower courts for guidance.

HARVEY KRUSE
ATTORNEYS & COUNSELORS A PROFESSIONAL CORPORATION
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800

mobile back up, Felty and his coworker decided not to fully plank the hydro mobile or put in a guardrail to block off the open area. They also did not wear fall protection when working on the improperly constructed hydro mobile. Felty then fell off the hydro mobile through the gap he left before starting his work. The trial court granted summary disposition to the general contractor based on the common work area doctrine, and the Court of Appeals affirmed:

> We hold that the trial court correctly ruled that plaintiff failed to establish that the absence of a guardrail on the scaffold created a high degree of risk to a significant number of workers. The record evidence shows that this was a hazard created by employees of a single subcontractor, Davenport, and that only two Davenport employees were exposed to the risk. This is not a case in which a general contractor required multiple trades to work at heights without any available fall protection. Davenport's own job foreman directed two Davenport employees, Copeman and Townsend, to move the scaffold for use by two other Davenport employees, Felty and Vance. Copeman and Townsend both were deemed "competent persons" to erect and move scaffolding on the job site. Their failure on this day to install the guardrail placed Felty and Vance at risk, and Felty and Vance's recognition of the danger-and their failure to abate it-placed themselves at risk. However, no evidence established that any other workers were placed at risk by this isolated failure. We calculate the alleged danger to a "significant number of workers" at the time the plaintiff was injured. *Ormsby*, 471 Mich at 59-60 n 12. Here, the area was roped off to prevent others from walking underneath the scaffold and no other trades were using the scaffold when this occurred. See *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 7-8; 574 NW2d 691 (1997). Accordingly, plaintiff failed to establish a genuine issue of material fact that a significant number of workers were exposed to the risk and the trial court correctly granted summary disposition to Skanska. [Appendix 30.]

Just as in *Felty*, Dancer created his own risk. Just as in *Felty* only one contractor was on the scaffolding at the time the risk existed. Just as in Felty, Dancer could have eliminated the risk had he used the safety equipment available to him. But the Court of Appeals majority in this case reached the exact opposite conclusion as *Felty*. This Court should address this conflict and reverse the Court of Appeals majority in this case.

## RELIEF REQUESTED

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The split between these two cases creates confusion in application of the law to subsequent cases.

Clark respectfully requests that this Honorable Court peremptorily reverse the Court of Appeals and reinstate summary judgment for defendants for the reasons stated above and in the Court of Appeals dissent. In the alternative, this Court should grant leave to appeal to clarify the common work area doctrine as the Court of Appeals remains unclear on the proper application of the narrow exclusion to nonliability for general contractors. All costs associated with this application should be imposed on plaintiffs.

**PROOF OF SERVICE**

The undersigned certifies that a copy of the foregoing pleading(s) has been electronically filed with the Clerk of the Court via the Electronic Case Filing system on the date shown below, which will send notice of filing to all attorneys of record. A copy of the application was also served on the Clerk of the Court of Appeals and the trial court as required by MCR 7.305(A)(3).

*/s/ Dana L. Pavelek*
Legal Assistant, Harvey Kruse, PC

DATED: May 31, 2016

Respectfully submitted,
HARVEY KRUSE, P.C.

BY:/s/Nathan Peplinski_____

Nathan Peplinski P66596
1050 Wilshire Drive, Suite 320
Troy, Michigan 48084-1526
(248) 649-7800
npeplinski@harveykruse.com

HARVEY KRUSE
A PROFESSIONAL CORPORATION
ATTORNEYS & COUNSELORS
1050 WILSHIRE DRIVE, SUITE 320, TROY, MICHIGAN 48084-1526 248-649-7800